



1           At the hearing on the motions, the USPS argued that because  
2 the number of items mailed by its customer is recorded in USPS Form  
3 3602, it constitutes "information of a commercial nature" exempted from  
4 disclosure by 39 U.S.C. § 410(c)(2) of the PRA. Section 410(c)(2)  
5 prescribes that the following need not be disclosed: "information of a  
6 commercial nature, including trade secrets, whether or not obtained from  
7 a person outside the Postal Service, which under good business practice  
8 would not be publicly disclosed."

### 9                           **I. FACTUAL BACKGROUND**

10           The FPPC is the State of California agency responsible for  
11 "the impartial, effective administration and implementation" of  
12 California's Political Reform Act of 1974 ("the Act"). (Pl.'s Statement  
13 of Undisputed Material Facts ("Pl.'s SUF") ¶ 1 (citing Cal. Gov't Code  
14 §§ 83100, 83111).) It is tasked with investigating possible violations  
15 of the Act upon receipt of a sworn complaint, and with bringing  
16 enforcement proceedings under the Act upon a showing of probable cause.  
17 (Pl.'s SUF ¶ 1.) The FPPC previously received a sworn complaint alleging  
18 that a recalled California elected official violated the Act's  
19 disclosure requirements for mass mailings by mailing over two hundred  
20 substantially similar pieces of mail "in connection with a local  
21 California campaign." (Decl. of Zachary Norton ("Norton Decl.") ¶ 2.))<sup>1</sup>

22           In response to the complaint, the FPPC served an Investigative  
23 Subpoena on the USPS seeking "the number of mail pieces delivered on  
24 October 9th, 10th, and 22nd in 2008 using Permit No. 2058." (Def.'s  
25 Resp. SUF at ¶ 5.) The USPS considered the FPPC's subpoena under 39

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27           <sup>1</sup> The USPS initially objected to the materiality of paragraphs 1  
28 through 4 of Plaintiff's Statement of Undisputed Material Facts. (Def.'s  
Resp. SUF ¶¶ 1-4.) However, at the October 9, 2012 hearing, the USPS  
withdrew these objections.

1 C.F.R. § 265.11(a)(6), which prescribes that the USPS may “[h]onor  
2 subpoenas or court orders only when disclosure is authorized.” The USPS  
3 “assesses whether disclosure is authorized [under this regulation] by  
4 determining whether documents may be released pursuant to the Freedom of  
5 Information Act.” (Def.’s Statement of Undisputed Facts (“Def.’s SUF”)  
6 ¶ 5; Decl. of Alexander W. Wood (“Wood Decl.”) ¶ 6.) The USPS later sent  
7 the FPPC three responsive postal statements, called Form 3602s, but  
8 aside from the permit holder’s name, the USPS “redacted virtually all of  
9 the [] information on the forms, including the total pieces mailed”  
10 under FOIA Exemptions 3 and 4. (Def.’s Resp. SUF ¶ 7.) The FPPC  
11 administratively appealed the redaction of these forms to the USPS Chief  
12 Counsel. (Def.’s SUF ¶ 8.) The USPS denied the appeal and affirmed the  
13 redaction under Exemptions 3 and 4. (Id. at ¶ 10.)

14 Subsequently, the FPPC filed the instant lawsuit under FOIA,  
15 in which it seeks a declaration that the USPS violated FOIA by  
16 withholding the records requested based on Exemptions 3 and 4; a  
17 declaration that the USPS’s actions were so flagrant as to be arbitrary  
18 and capricious; an injunction precluding the USPS from asserting  
19 Exemptions 3 or 4 in response to the FPPC’s request; an order directing  
20 the immediate disclosure and production of the requested records; and  
21 attorneys’ fees and costs. (Compl. ¶¶ 30-35.)

22 The USPS concedes that the information the FPPC seeks  
23 “pertains to an organization that is not a commercial enterprise [and]  
24 was mailed in connection with an election campaign that is now over.”  
25 (Wood Decl. ¶ 11; Wood Decl., Ex. G, 38:9-11; Def.’s Mot. 9:5-6.)  
26 Further, the USPS no longer asserts Exemption 4 as a basis for its  
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1 withholding decision.<sup>2</sup> Therefore, the sole issue in the motions is  
 2 whether 39 U.S.C. § 410(c)(2) authorizes the USPS to redact and withhold  
 3 the quantity of mail sent by the permit holder using Permit No. 2058.

## 4 II. DISCUSSION

5 "The Freedom of Information Act . . . requires federal  
 6 agencies to make Government records available to the public, subject to  
 7 nine exemptions for specific categories of material." Milner v. Dep't of  
 8 Navy, 131 S. Ct. 1259, 1261-62 (2011). However, Exemption 3 of the FOIA  
 9 does not require disclosure of "matters that are . . . specifically  
 10 exempted from disclosure by statute . . . if that statute . . .  
 11 establishes particular criteria for withholding or refers to particular  
 12 types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(ii).

13 "As a general rule, we employ a two-part inquiry to determine  
 14 whether Exemption 3 applies to a particular FOIA request. First, we  
 15 determine whether the withholding statute meets the requirements of  
 16 Exemption 3. Then, we determine whether the requested information falls  
 17 within the scope of the withholding statute." Carlson v. U.S. Postal  
 18 Serv., 504 F.3d 1123, 1127 (9th Cir.2007) (citation omitted). When  
 19 determining whether information falls within the scope of Exemption 3,  
 20 deference to an agency's interpretation of the withholding statute is  
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 23 <sup>2</sup> See Def.'s Mot. 2:12 n.1. The parties also initially disputed the  
 24 scope of Plaintiff's FOIA request. See (Pl.'s Cross Mot. for Summ. J.  
 25 & Opp'n ("Pl.'s Mot.") 4:22-23; 1:5-6 (alleging that the USPS  
 26 "unilaterally expanded the scope of the appeal to include information  
 27 about 'mailing costs' and 'mailing dates'" even though the "one piece of  
 28 information the FPPC sought was simply the number of pieces of mail  
sent"); Def.'s Reply & Opp'n 6:2-3, 5:20 (asserting that Defendant's  
 confusion about the scope of the request is "understandable" given  
 "Plaintiff's own lack of clarity"). The parties now agree that the FPPC  
 seeks "only the number of pieces mailed," therefore only those arguments  
 concerning the quantity of mail sent are considered here. (Def.'s Reply  
 & Opp'n 6:3-4.)

1 "inappropriate" because the "basic policy of FOIA is to ensure that  
2 Congress and not administrative agencies determines what information is  
3 confidential." Id. (citation omitted).

4 The USPS argues that § 410(c)(2) is a withholding statute  
5 under Exemption 3 that satisfies the first Exemption 3 requirement. The  
6 FPPC does not concede that § 410(c)(2) is a viable withholding statute  
7 under Exemption 3, but assumes arguendo that the statute meets the  
8 requirements of Exemption 3, and contends: "the Postal Service simply  
9 has not and cannot demonstrate that information pertaining to only the  
10 number of pieces mailed comes within the scope of that statute." (Pl.'s  
11 Mot. 7:22 n.3.) In light of each party's respective argument, the Court  
12 "assume[s] without deciding that 39 U.S.C. § 410(c)(2) qualifies as an  
13 Exemption 3 statute for purposes of th[e] [motions] and proceed[s]  
14 directly to the question whether the requested records fall within the  
15 scope of § 410(c)(2)." Carlson, 504 F.3d at 1127.

16 The USPS asserts that the quantity of mail sent is exempted  
17 from disclosure by § 410(c)(2) because this statute does not require  
18 disclosure of the following: "information of a commercial nature . . .  
19 which under good business practice would not be publicly disclosed."  
20 § 410(c)(2). The Ninth Circuit discussed the scope of § 410(c)(2) in  
21 Carlson, holding that the first issue for determination is whether the  
22 withheld information is of a commercial nature. Carlson, 504 F.3d at  
23 1129. In Carlson, the Ninth Circuit states: "[i]nformation is  
24 commercial if it relates to commerce, trade, or profit.'" Id. (citation  
25 omitted) (applying "the common meaning of the term ['commercial']").  
26 Carlson also states: "The majority of cases which have upheld USPS's  
27 withholding of information under § 410(c)(2) have concerned proprietary  
28 information." Id.; see, e.g., Wickwire Gavin, P.C. v. U.S. Postal Serv.,

1 356 F.3d 588, 589 (4th Cir. 2004) (upholding under the PRA's business  
2 practice exception the USPS's withholding of "thirteen pages of  
3 spreadsheets detailing quantity and pricing information" in which  
4 bidders sought "to become USPS's exclusive provider of mailing  
5 supplies"); Amer. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.,  
6 742 F. Supp. 2d 76, 81 & 83 (D.D.C. 2010) (stating that such data as  
7 "[t]he Postal Service's decisions regarding lump-sum bonus and salary  
8 increases" is properly considered commercial information under the PRA;  
9 and that "no evidence [was presented] contradicting the agency's  
10 contention that private sector delivery firms would not disclose this  
11 information"); Reid v. U.S. Postal Serv., No. 05-cv-294-DRH, 2006 WL  
12 1876682, at \*6 (S.D. Ill. July 5, 2006) (upholding the USPS's refusal to  
13 release information that could reveal the postage rate it charges  
14 mailers, which included the postage amount and the total number of items  
15 mailed); Airline Pilots Ass'n, Int'l v. U.S. Postal Serv., No. 03-2384,  
16 2004 WL 5050900 (D.D.C. June 24, 2004) (determining under the PRA's good  
17 business practice standard that the USPS need not disclose rate  
18 information, methods of operation, and performance requirements  
19 contained in a delivery agreement between the USPS and FedEx); Robinett  
20 v. U.S. Postal Serv., No. CIV. A. 02-1094, 2002 WL 1728582, at \*5 (E.D.  
21 La. July 24, 2002) (withholding information "reflecting the Postal  
22 Service's evaluation of [plaintiff's] employment application" where such  
23 information falls under the Postal Service's "regulations defin[ing]  
24 'information of a commercial nature'" and "ha[s] 'customarily been  
25 safeguarded in both the public and private sectors'"); Weres Corp. v.  
26 USPS, No. 95-1984 (NHJ), 1996 U.S. Dist. LEXIS 22636, at \*9 (D.D.C.  
27 Sept. 23, 1996) (deciding that the USPS need not disclose pricing  
28 information it received from unsuccessful bidders in response to its

1 commercial solicitation when the USPS "set forth an undisputed, non-  
2 conclusory, and logical 'good business practice' rationale for its  
3 decision to withhold unsuccessful bid prices from public disclosure").  
4 Carlson further states: "Post office names, addresses, telephone  
5 numbers, hours of operation and final collection times are not  
6 'information of a commercial nature,' and, therefore, are not within the  
7 scope of § 410(c)(2)." Carlson, 504 F.3d at 1130.

8 In this case, the FPPC seeks the number of items mailed by a  
9 noncommercial organization in connection with an election that is now  
10 over. (Wood Decl. ¶ 11; Norton Decl. ¶ 9.) The USPS contends this  
11 information is commercial and proprietary, because "the number of pieces  
12 of mail a customer entrusts to the Postal Service is connected with  
13 trade and traffic of commerce in general" and because this information  
14 "was collected as part of the commercial transaction between the Postal  
15 Service and its customer." (Supplemental Wood Decl. ¶ 2; Def.'s Mot.  
16 9:6-7.) "The Postal Service considers the actual number of pieces  
17 mailed, whether disclosed in isolation, or connected with other  
18 information. . . , to be commercial information and thus not available  
19 for disclosure." (Supplemental Wood Decl. ¶ 2.) It argues that the  
20 information sought is of a commercial nature because its disclosure  
21 could potentially impair the relationship between the USPS and its  
22 customers, and could cause such users to use the delivery services of  
23 the USPS's competitors, who are not subject to FOIA's requirements.  
24 (Def.'s Mot. 10:12-13.) The FPPC counters that it strains credibility to  
25 suggest that "*the number of pieces of mail sent . . . .* relates to  
26 commerce, trade, or profit, such that it is proprietary to the Postal  
27 Service." (Pl.'s Mot. 8:24-25.)  
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1           The USPS also argues in a footnote in its Reply Brief that the  
2 subject information falls within the sixth category of 39 C.F.R. §  
3 265.6(b)(3), which it characterizes as a "regulation[] clarifying the  
4 type of information that satisfies the good business practice exception"  
5 of § 410(c)(2). (Def.'s Reply & Opp'n 6:18 n.4; Def.'s Mot. 8:18-19.)  
6 The referenced regulation prescribes in pertinent part: "Records not  
7 subject to mandatory public disclosure [include] [r]ecords compiled  
8 within the Postal Service which would be of potential benefit to persons  
9 or firms in economic competition with the Postal Service." 39 C.F.R. §  
10 265.6(b)(3)(vi). The USPS contends that disclosing the quantity of mail  
11 sent "could potentially impair the relationship between the Postal  
12 Service and its customers" and could cause its customers to "migrate to  
13 its competitors, who are not subject to FOIA's requirements." (Wood  
14 Decl. ¶ 11; Def.'s Mot. 10:12-13.) The FPPC counters that the USPS's  
15 claim—that its competitors could benefit if it disclosed the quantity of  
16 mail sent by Respondent—is "completely unsupported." (Pl.'s Mot. 10:2.)  
17 The FPPC further argues that the USPS cannot suffer competitive harm  
18 since it lacks competitors, given its government sanctioned, criminally  
19 enforced monopoly over door-to-door mail service. (Pl.'s Mot. 10:3-11:9;  
20 Pl.'s Reply & Opp'n 6:6-10.)

21           As the Ninth Circuit states in Carlson, "because both [the  
22 regulation and the statute] require that the information be of 'a  
23 commercial nature' in the first instance," the issue here is whether the  
24 amount of mail sent by a noncommercial entity in connection with a  
25 noncommercial election is "information of a commercial nature," as that  
26 term is used in § 410(c)(2). Carlson, 504 F.3d at 1129. The USPS has not  
27 supported its conclusion that the mere disclosure of the number of  
28 documents mailed in the situation at issue here constitutes "information



1 of a commercial nature" within the meaning of § 410(c)(2). As the Ninth  
2 Circuit states in Kamman v. IRS:

3 [FOIA] exemptions are to be narrowly construed by  
4 the courts. The burden is on the government to prove  
5 that a particular document falls within one of the  
6 exemptions. Affidavits of agency employees may be  
7 used to satisfy this burden. However, the government  
8 may not rely upon conclusory and generalized  
allegations of exemptions. The affidavits must  
contain reasonably detailed descriptions of the  
documents and allege facts sufficient to establish  
an exemption.

9 56 F.3d 46, 48 (9th Cir. 1995) (citations omitted). Here, the USPS  
10 concedes that the sender "is not a commercial enterprise," the documents  
11 were "mailed in connection with an election campaign that is now over,"  
12 and the only information sought is "the number of mail pieces delivered  
13 on October 9th, 10th, and 22nd in 2008 using Permit No. 2058." (Wood  
14 Decl. ¶¶ 1, 11; Def.'s Resp. SUF at ¶ 5.) The USPS has not shown that  
15 the requested information is within the realm of what is considered to  
16 be commercial information; nor has it shown how the disclosure of the  
17 requested numerical information could potentially impair the  
18 relationship between the USPS and its customers. Further, the USPS has  
19 not shown that the mail quantities at issue are its proprietary  
20 information merely because this information is recorded in USPS Form  
21 3602, since this recording has not been shown to be "information of a  
22 commercial nature" within the meaning of § 410(c)(2).

23 Nor, despite its asserted concerns, has the USPS shown that  
24 disclosure of the specific and limited information at issue here could  
25 result in the users of the USPS's mail delivery services ceasing to use  
26 the USPS for such services and instead using the services of the USPS's  
27 competitors, who are not subject to FOIA's requirements. This assertion  
28 is not supported with facts showing that the information is commercial

1 in nature, or that any of USPS's competitors would not have to release  
2 such information in response to a subpoena from the FPPC. It is  
3 undisputed that California "Government Code Section 83118 provides the  
4 FPPC with the power to subpoena any records . . . material to the  
5 performance of FPPC's duties," which include enforcing the disclosure  
6 requirements for political mass mailings. (Wood Decl., Ex. C.)

7 "[I]t is clear that the Postal Service may not rest [its  
8 arguments for its withholding decision] on bare allegations as to what  
9 might be," and that such conclusory assertions are insufficient support  
10 for its exemption decision. Nat'l W. Life Ins. Co. v. United States,  
11 512 F. Supp. 454, 462 (N.D. Tex. 1980). "In light of the clear  
12 Congressional policy favoring disclosure of governmental information,  
13 this court can find no reason to distinguish between the Postal Service  
14 and other" entities that could be required to disclose the same type of  
15 numerical information in response to a FPPC subpoena. Id. at 462.

### 16 **III. CONCLUSION**

17 Since the FPPC requests just the amount of mail sent by an  
18 admittedly noncommercial enterprise in connection with a completed  
19 noncommercial California election, and the USPS has not shown that this  
20 request involves "information of a commercial nature" under § 410(c)(2),  
21 Exemption 3 is inapplicable, and the information sought must be  
22 disclosed. Therefore, the USPS's Motion for Summary Judgment is DENIED,  
23 and the FPPC's Cross Motion for Summary Judgment is GRANTED as follows:  
24 the USPS shall provide the FPPC with the requested information, namely,  
25 the number of pieces of mail sent on October 9th, 10th, and 22nd in 2008

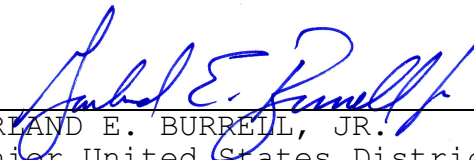
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1 using Permit No. 2058, within twenty (20) days of the date on which this  
2 Order is filed. Judgment shall be entered in favor of the Plaintiff.

3 Dated: October 15, 2012

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6 GARLAND E. BURRELL, JR.  
7 Senior United States District Judge  
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